

REMARKS

With the addition of new claims 27-32, claims 1-32 are pending. However, claims 1-20 were withdrawn from further consideration as being drawn to non-elected inventions. Reconsideration and allowance of all claims, as amended, are requested.

No new matter is added by the foregoing amendments. The amendment in the specification, wherein "evaluation" was changed to "elevation," was made to correct a typographical error. It is clear from the context of the paragraph where the error occurred that the use of the word "evaluation" instead of "elevation" was a typographical error.

With regard to the amendment of dependent claim 26, that amendment also was made to correct a typographical error. It is clear from a reading of claim 26 that the words "and at" were inadvertently omitted. Support for this amendment appears in the specification on page 15 in the sentence at lines 19-21, where the words "and at" were originally included in that sentence, which corresponds directly with claim 26.

The Objection to Claim 26

The Examiner objected to dependent claim 26 based on an informality, which she characterized as: "on line 3, 't' should be 'at'." Actually, as indicated above, "t" should be "and at." The appropriate correction has been made.

The § 102 Rejections

The Examiner rejected claims 21-26 under § 102(b) as being anticipated by the following references: Swiss Patent Disclosure 506609 (Decaux, et al.); U.S. Pat. No. 4,092,095 (Straitz, III); U.S. Pat. No. 4,614,491 (Welden); U.S. Pat. No. 3,677,234 (Dutkiewicz); and U.S. Pat. No. 4,252,300 (Herder). With regard to each of claims 21-26 the Examiner took the position that the references cited in support of her rejections disclosed the invention as claimed including a “plurality of adjacent burners.”¹ (Emphasis added).

With regard to independent claim 21 the Examiner gave no weight to the functional language of claim 21 in evaluating the patentability of the claimed invention, and took the position that:

Regarding the functional language of claim 21, since all of the references listed above disclose the claimed structure of claim 21 (i.e., the plurality of adjacent burners), they anticipate claim 21. Moreover, since all of the references listed above disclose the structure or structures, which applicant discloses as providing the function, e.g., the variably spaced burners or different burners burning different fuels, the structures disclosed by these references necessarily provide the claimed functions. (Emphasis added).

¹ In addition to stating that the cited references disclosed “a plurality of adjacent burners,” the Examiner stated some other reasons in support of the rejections, which other reasons Applicants discuss and rebut on pages 24-29 herein. However, the disclosure of “a plurality of adjacent burners” position is common to each of the rejections set forth in the Office Action.

With regard to dependent claims 23-25, the Examiner took the position that:

All of claims 23-25 recite the intended use of the claimed structure of these claims. It has been held that a claim containing a “recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus” if the prior art teaches all the structural limitations of the claim. Ex parte Masham, 2 USPQ2d 1647 (BPAI 1987). Since Dutkiewicz discloses all of the claimed structure, Dutkiewicz anticipates the claims. Moreover, since Dutkiewicz discloses each of the burners having valves 40, the device of Dutkiewicz necessarily can provide the functions of either providing the same firing rates or different firing rates. (Emphasis added).

Applicants respectfully disagree with both of the above quoted positions for several reasons. First, the Examiner did not account for the “variable heat flux” limitation in the preamble of independent claim 21 and dependent claims 22-26. Second, the Examiner incorrectly dismissed the functional language in independent claim 21, which functional language is entitled to weight in considering the claimed invention as a whole as against the cited prior art references. All of the §102 rejections should be withdrawn in view of the “variable heat flux” limitation in the preamble of independent claim 21 and/or the functional language in the body of claim 21. Those limitations (*i.e.*, the preamble limitation and the functional language limitation) separately and in combination distinguish the claimed invention over the prior art.

To be anticipating, a prior art reference (1) must disclose each and every limitation of the claimed invention, (2) must be enabling, and (3) must describe the claimed invention sufficiently to have placed it in possession of a person of ordinary skill in the field of the invention. *Helifix Ltd. v.*

Blok-Lok, Ltd., 208 F.3d 1339, 1346, 54 USPQ2d 1299, 1303 (Fed. Cir. 2000). If any one of the three requirements is not met, an invention is not anticipated under § 102(b). *Id.* In the instant case, since none of the cited references meet any or all of the three requirements, claims 21-26 are not anticipated by the cited references.

Since claims 21-26 specifically claim a “variable heat flux side-fired burner system,” and none of the cited references teach or disclose a “variable heat flux” burner system, the cited references do not anticipate Applicants’ claimed invention. *See Rowe v. Dror*, 112 F.3d 473, 480-81, 42 USPQ2d 1550, 1555 (Fed. Cir. 1997) (applicants’ use of term “angioplasty” in preamble of claim in reference to balloon catheter claimed in application was to be construed as a structural limitation of the claim); *Poly-America, L.P. v. GSE Lining Technology, Inc.*, 383 F.3d 1303, 1310, 72 USPQ2d 1685, 1689 (Fed. Cir. 2004) (preamble language relating to “blown film” disclosed a fundamental characteristic of the claimed invention that is properly construed as a limitation of the claim). Since Applicants’ application makes clear that their invention pertains to processes which use a “variable heat flux” side-fired burner system, the term “variable heat flux” in claims 21-26 is a fundamental characteristic of the claimed invention and must be construed as a structural limitation in those claims.² *See, id. Cf., Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1380, 58 USPQ2d 1286, 1288 (Fed. Cir. 2001) (term appearing in preamble of every claim and in specification limited the invention being claimed).

² Applicants’ application makes clear that the limitation of “variable heat flux” is necessary to give meaning to claims 21-26 and properly define the invention. For example, the title of the invention is “Reformer Process With Variable Heat Flux Side-Fired Burner System.” (Emphasis added). *See a/so*, the application at page 8, lines 16-18; page 9, lines 23-25; page 10, lines 16-20; page 13, lines 6-12; page 15, lines 3-12; page 17, lines 19-20; page 17, line 16 to page 18, line 10; page 19, lines 3-7; page 20, lines 20-22; page 21, lines 3-6; page 21, lines 10-14; page 21, lines 18-20; page 21, lines 22-25; page 24, lines 1-4; page 25, lines 14-15; page 25, lines 18-19; page 26, lines 8-9; page 26, lines 19-20; claim 1 (page 28, lines 19-26); claim 9 (page 30, lines 19-26); claim 12 (page 22, lines 6-13); claim 13 (page 34, lines 13-19); claim 17 (page 36, lines 5-11); claim 20 (page 39, lines 6-12); and the Abstract (page 32, pages 11-14).

The instant case is very similar to the recently decided *Poly-America* case where the Court concluded that the phrase “blown film” in the preamble of the claims was to be continued as a limitation. In reaching that conclusion, the Court said:

We agree with Poly-America that the phrase “blown-film” is a limitation of the claims of the ‘047 patent. The specification is replete with references to the invention as a “blown-film” liner, including the title of the patent itself and the “Summary of the Invention.” The phrase is used repeatedly to describe the preferred embodiments, and the entire preamble “blown-film textured liner” is restated in each of the patent’s seven claims. Our analysis shows that the inventor considered that the “blown-film” preamble language represented an important characteristic of the claimed invention.

383 F.3d at 1310, 72 USPQ2d at 1689.

Similarly, in this case, the specification is replete with references to the invention as a “variable heat flux” side-fired burner system, including in the title of the invention and the “Brief Summary of the Invention.” The phrase “variable heat flux” is used repeatedly throughout the specification to describe the various embodiments of the invention, and the entire preamble “variable heat flux side-fired burner system” is restated in each of claims 21-26 (as well as in each of new claims 27-32). In addition, the phrase “variable heat flux” is stated in each of withdrawn independent claims 1, 9, 12, 13, 16 and 20. As in *Poly-America*, all of this shows that Applicants considered that the “variable heat flux” preamble language represented an important characteristic of their claimed invention.

Since the cited references make no mention of a “variable heat flux” side-fired burner system

such as that taught by Applicants, the rejection of claims 21-26 under § 102 should be withdrawn.

In addition, the cited references are not enabling with respect to Applicants' claimed invention (and therefore do not meet the second of the three requirements to be anticipating). To support a rejection of a claim, a reference must provide a description sufficient to enable a person of ordinary skill in the art how to make and use the claimed invention. *Beckman Instruments, Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551, 13 USPQ2d 1301, 1304 (Fed. Cir. 1989), citing *In re Payne*, 606 F.2d 303, 314, 203 USPQ 245, 255 (C.C.P.A. 1979) (reference relied on to support rejection must provide an enabling disclosure, *i.e.*, must place the claimed invention in possession of the public). None of the cited references do that, as a person of ordinary skill in the art could not make and use Applicants' variable heat flux side-fired burner system after reading any or all of the disclosures and drawings in the cited references.

Furthermore, the "functional limitation" in independent claim 21 also is not disclosed or taught in any of the cited references.³ In characterizing the language of claim 21 as "functional," the Examiner refers to a technique of drafting patent claims which has been approved by the courts. "There is nothing intrinsically wrong in defining something by what it does rather than by what it is." *In re Echerd*, 471 F.2d 632, 635, 176 USPQ 321, 322 (CCPA 1973), citing *In re Swinehart*, 439 F.2d 210, 212, 58 CCPA 1027, 1030 (1971); *In re Fuetterer*, 319 F.2d 259, 50 CCPA 1453 (1963). Applicants' choice to define an element of its variable heat flux side-fired burner system functionally (*i.e.*, by what it does) must be recognized as a positive limitation of Applicants' claimed invention. The distinguishing features of these functional limitations cannot simply be ignored. *Id.* See also,

³ That "functional limitation" is "thereby producing a variable heat flux substantially approximating said process heat requirement and simultaneously maximizing said heat flux to substantially all of said first portion of said reaction chamber while maintaining substantially all of said first portion substantially at said design temperature without exceeding said design temperature of said reaction chamber."

MPEP 2173.05(8) (“A functional limitation must be evaluated and considered, just like any other limitation of the claim, for what it fairly conveys to a person of ordinary skill in the pertinent art in the context in which it is used.”).

Since Applicants’ invention includes at least one feature (*i.e.*, the positive limitation (s) defined by the functional language) that is not disclosed by the cited references, those references cannot support a rejection of claims 21-26 under § 102. *Rowe v. Dror*, 112 F.3d at 478, 42 USPQ2d at 1553 (Fed. Cir. 1997), *quoting*, *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571, 230 USPQ 81, 84 (Fed. Cir. 1986) (“[A]bsence from the reference of any claimed element negates anticipation.”)

Should there be any doubt regarding the interpretation of, and rejection on, the cited references, it must be resolved in favor of Applicants. *In re Sheppard*, 339 F.2d 238, 243, 144 USPQ 42, 46 (CCPA 1964). To be an anticipating, a reference must describe and enable Applicants’ claimed invention, including all claim limitations, with sufficient clarity and detail to establish that the subject matter already existed in the prior art and that its existence was recognized by persons of ordinary skill in the field of the invention. *Crown Operations International Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375, 62 USPQ 1917, 1921 (Fed. Cir. 2002).

For all of the reasons discussed herein, Applicants’ claimed invention is not anticipated by any of the cited references. Those references do not provide a description sufficient to teach persons skilled in the art how to make and use the claimed invention (and therefore are not enabling references); do not disclose all of the features of the invention in claims 21-26 (*e.g.*, the limitations in the functional language); and do not disclose a “variable heat flux” side-fired burner system having all of the features set forth in claims 21-26. Accordingly, all of the rejections of claims 21-26 under §102 should be withdrawn.

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Each specific rejection is discussed further below together with Applicants' reasons why the rejections should be withdrawn. In addition, new claims 27-32 are discussed together with the support for those claims.

The Rejection of Claim 21 in View of Decaux, *et al.*

The Examiner rejected independent claim 21 under § 102 as being anticipated by Decaux, *et al.* (CH 506609), stating "Decaux, *et al.* discloses the invention as claimed including a plurality of adjacent burners 21." However, the Examiner did not refer to any specific text or illustrations in this reference to support her position that the reference "discloses the invention as claimed."

For the reasons discussed above, Applicants respectfully disagree with the Examiner. Although Decaux does disclose a plurality of adjacent burners 21, it does not disclose all of the features of Applicants' claimed invention, as set forth in claim 21:

A variable heat flux side-fired burner system ..., comprising: a plurality of adjacent burner units adapted to combust at least one fuel, thereby producing a **variable** heat flux substantially approximating said process heat requirement **and** simultaneously maximizing said heat flux to substantially all of said first portion of said reaction chamber **while** maintaining substantially all of said first portion substantially at said design temperature without exceeding said design temperature of said reaction chamber. (Emphasis added).

As discussed on pages 22-23 herein, the above language from claim 21 (especially the language highlighted for emphasis) constitutes a positive limitation or key feature of the claimed invention which is not disclosed by Decaux, *et al.*

Therefore, Applicants' claimed invention differs from Decaux, *et al.* Most significantly, the burners shown in Figures 1 and 2 of Decaux, *et al.* do not produce a "**variable** heat flux" substantially approximating the process heat requirement **and** simultaneously maximizing the heat flux to substantially all of a first portion of the reaction chamber (*e.g.*, a reformer tube) **while** maintaining substantially all of the first portion substantially at a design temperature without substantially exceeding the design temperature.

Since Applicants' claimed invention, as claimed in independent claim 21, includes at least one feature that is not disclosed in Decaux, *et al.*, Applicants' claimed invention is novel and not anticipated by Decaux, *et al.* As discussed above, that feature(s) is a plurality of burners that produce a "**variable** heat flux" substantially approximating a process heat requirement **and** simultaneously maximizing the heat flux to substantially all of a first portion of a reaction chamber (*e.g.*, a reformer tube) **while** maintaining substantially all of the first portion substantially at a design temperature without exceeding the design temperature of the reaction chamber (*e.g.*, a reformer

tube). Since this feature(s) is not disclosed or taught in Decaux, *et al.*, nor is it inherent in that reference, independent claim 21 is novel and is not anticipated by Decaux, *et al.*

For these reasons and all of the reasons discussed on pages 18-24 herein, the rejection of claim 21 under § 102 as being anticipated by Decaux, *et al.* should be withdrawn.

The Rejection of Claims 21 and 22 in View of Straitz, III

In rejecting independent claim 21 and dependent claim 22 under § 102 as being anticipated by Straitz, III (U.S. Pat. No. 4,092,095), the Examiner took the position that:

Straitz, III discloses the invention as claimed including a plurality of adjacent burner units (see Figs. 1 and 2), a common fuel supply 40, a common air supply 35, means 42 for regulating a flow of fuel to each burner unit from said common fuel supply, and means 37, 38 for regulating a flow of air to each burner unit from said common air supply. As per applicant's uses as per applicant's specification, the means for regulating a flow of fuel is a valve 52 and the means for regulating a flow of air are dampers 44.

Although Straitz, III does include a plurality of adjacent burner units, it does not disclose Applicants' claimed invention as set forth in independent claim 21. As with Decaux, *et al.* discussed above, Straitz, III does not teach or disclose a "variable heat flux side-fired burner system" as in Applicants' claim 21. (Emphasis added). Nor does Straitz, III teach or disclose the functional

limitation in claim 21. Accordingly, claim 21 is not anticipated by Straitz, III, basically for the same reasons discussed above with regard to Decaux, *et al.*

Dependent claim 22 depends from independent claim 21. Since independent claim 21 is not anticipated under § 102 by Straitz, III (as that reference does not disclose all of the features in claim 21), dependent claim 22 which depends from independent claim 21 also is not anticipated.

For these reasons and all of the reasons discussed on pages 18-24 herein, the rejection of claims 21 and 22 under § 102 as being anticipated by Straitz, III should be withdrawn.

The Rejection of Claims 21 and 23 in View of Welden

The Examiner rejected independent claim 21 and dependent claim 23 under § 102 as being anticipated by Welden (U.S. Pat. No. 4,614,491). In support of her position, the Examiner stated:

Welden discloses the invention as claimed including a plurality of adjacent burners. See Fig. 3. The burners are equally spaced apart and can be fired at different firing rates. See column 2, lines 50 and 51.

Applicants respectfully disagree. Although Welden does include a plurality of adjacent burner units, it does not disclose Applicants' claimed invention as set forth in independent claim 21. As with Decaux, *et al.* and Straitz, III discussed above, Welden does not teach or disclose a "variable heat flux side-fired burner system" as in Applicants' claim 21. (Emphasis added). Nor does Welden teach or disclose the functional limitation in claim 21. Accordingly, claim 21 is not anticipated by Welden, basically for the same reasons discussed above with regard to Decaux, *et al.* and Straitz, III.

Dependent claim 23 depends from independent claim 21. Since independent claim 21 is not anticipated under § 102 by Welden (as that reference does not disclose all of the features in claim 21), dependent claim 23 which depends from independent claim 21 also is not anticipated.

For these reasons and all of the reasons discussed on pages 18-24 herein, the rejection of claims 21 and 23 under § 102 as being anticipated by Welden should be withdrawn.

The Rejection of claims 21 and 23-25 in View of Dutkiewicz

With respect to the rejection of independent claim 21 under § 102 as being anticipated by Dutkiewicz (U.S. Pat. No. 3,677,234), the Examiner stated:

Dutkiewicz discloses the invention as claimed including adjacent burner units variably spaced. See Figs 1 and 2 and the first full paragraph of column 3.

Applicants respectfully disagree. Although the furnace apparatus of Dutkiewicz does include adjacent burner units, this reference does not disclose a “variable heat flux side-fired burner system” as in Applicants’ independent claim 21. Moreover, Dutkiewicz also does not teach or disclose the functional limitation(s) set forth in claim 21. Accordingly, Applicants’ claimed invention, as claimed in claim 21, is not anticipated by Dutkiewicz because this reference does not disclose all of the features of the claimed invention, as discussed on pages 18-24 above.

In rejecting dependent claims 23-25 the Examiner took the position that claims 23-25 recite the “intended use” of the claimed structure of these claims, and stated:

Since Dutkiewicz discloses all of the claimed structure, Dutkiewicz anticipates the claims. Moreover, since Dutkiewicz discloses each of

the burners having valves 40, the device of Dutkiewicz necessarily can provide the functions of either providing the same firing rates or different firing rates.

Applicants respectfully disagree for several reasons. Dependent claims 23-25 do not recite the “intended use” of the variable heat flux side-fired burner system. Rather, each of these dependent claims adds structural limitations regarding the spacing and the firing rates of the burner units.

Just because these limitations are preceded by the word “wherein” does not indicate “intended uses” which are not structurally limiting. When the word “wherein” (or “whereby”) and its accompanying phrase set forth a structural limitation for the invention recited in a claim, the word “wherein” (or “whereby”) and the accompanying phrase are considered a positive limitation of the claim, and thereby limit the claim accordingly. *Schienenman v. Zalkind*, 112 F.2d 1017, 1019, 46 USPQ 141, 143 (C.C.P.A. 1940) (whereby clause that sets forth a structural limitation and not merely the results achieved by the claimed structure is a positive limitation of the claim).

In the instant case, the “wherein” phrases all introduce positive limitations in claims 23-25. Specifically, in claim 23 the burner units are “equally spaced apart” This requirement of equal spacing between the burners (rather than the burners abutting) constitutes a positive limitation. Similarly, in claim 24, the burner units are “variably spaced apart ...” The requirement that the spacing between the burners be variable (rather than uniform) also is a positive limitation. Finally, in claim 25, although the positive limitation is the same as in claim 24 (*i.e.*, that the spacing be variable, rather than uniform), the fuel is combusted at a different firing rate by each burner (rather than at an identical firing rate as in claim 24).

Although Dutkiewicz discloses valves 40, which conceivably could be used to regulate the firing rates of the burner units, Dutkiewicz does not disclose a “variable heat flux side-fired burner

system” as in independent claim 21 or in dependent claims 23-25. See the remarks previously made in this regard with respect to independent claim 21 on pages 19-22 herein.

Moreover, dependent claims 23-25 depend from independent claim 21. Since independent claim 21 is not anticipated by Dutkiewicz under § 102 (for the reasons previously explained), dependent claims 23-25 which depend from independent claim 21 also are not anticipated.

For these reasons and the reasons discussed on pages 18-24 herein, the rejection of independent claim 21 and dependent claims 23-25 under § 102 as being anticipated by Dutkiewicz should be withdrawn.

The Rejection of Claims 21 and 26 in View of Herder

The Examiner also rejected independent claim 21 and dependent claim 26 under § 102 as being anticipated by Herder (U.S. Pat. No. 4,252,300). In support of this rejection, the Examiner took the position that:

Herder discloses the invention as claimed including a plurality of adjacent burner units (see Figs. 1 and 2) and at least one burner unit 30-1 combusts at least one first fuel or fuel mixture containing the first fuel (gas) and at least one other burner unit 30-2 combusts at least one second fuel (oil) or a fuel mixture containing a second fuel.

Applicants respectfully disagree. Like the other cited references, Herder does not disclose a “variable heat flux side-fired burner system” as claimed in independent claim 21. Nor does Herder teach or disclose the functional limitation previously discussed herein. Accordingly, since Herder does not disclose all of the limitations or features of the claimed invention, as set forth in independent

claim 21, claim 21 is not anticipated by this reference.

Moreover, dependent claim 26 depends from independent claim 21. Since independent claim 21 is not anticipated under § 102 (for the reasons previously discussed), dependent claim 26 which depends from independent claim 21 also is not anticipated.

For these reasons and the reasons discussed on pages 18-24 herein, the rejection of independent claim 21 and dependent claim 26 under § 102 as being anticipated by Herder should be withdrawn.

New Claims 27-32

Applicants have added new claims 27-32 to more clearly define their invention. No new matter is added by any of the new claims, all of which are supported by the specification and drawings of the application (as discussed below).

As with claims 21-26, new claims 27-32 are directed to a “variable heat flux side-fired burner system.” (Emphasis added). Like original claims 21-26, new claims 27-32 also are distinguishable from the prior art references of record. In addition to the “variable heat flux” limitation in the preamble of the new claims, these claims also include functional limitations further defining the side-fired burner system. In addition, independent claims 28 and 29 include additional limitations

defining the claimed invention. All of the limitations of new claims 27-32 are supported in the application.

In claim 27, the “combination” of the side-fired burner units is adapted to produce a “variable heat flux.” This limitation is supported by Figures 3-10 and Figures 21-23, as well as the text of specification discussing each of those Figures.

Claim 28 includes an additional positive limitation that the first portion of the reaction chamber is disposed in a fired first interior region of an elongated shell, and the second portion of the reaction chamber is disposed in an unfired second interior region of the elongated shell. These limitations are supported by Figures 3, 5 and 7, as well as the specification at page 18, lines 2-5 and page 22, line 1.

Claim 29 includes the same limitation as the limitation as in claim 28 plus an additional positive limitation that at least a portion of a flow of the flue gas flows counter-currently to a flow of the process fluid. This limitation is supported in the specification at page 11, lines 1-4; page 13, lines 20-23; page 18, lines 2-5; page 22, lines 1-4; claim 2 (page 29, lines 5-7); and claim 15 (page 35, lines 4-6).

New dependent claims 30-32 include additional positive limitations pertaining to “elongated side-fired burner assemblies.” In claim 30, the burner assemblies are formed from adjacent side-fired burner units which are adjacent the inner wall of the elongated shell. In claim 31, the burner assemblies are substantially equally spaced apart peripherally around the inner wall of the elongated shell. In claim 32, at least two neighboring side-fired burner assemblies are substantially equidistant from the reaction chamber. The support for these positive limitations in new dependent claims (30,

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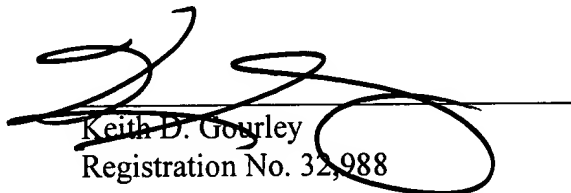
31, and 32) is in the specification at page 11, lines 14-24; page 14, lines 3-12; claim 10 (page 31, line 19 to page 32, line 3); and claim 18 (page 37, lines 9-18).

SUMMARY

For all of the foregoing reasons, Applicants submit that all of the pending claims are patentable over the art of record. Withdrawal of the rejections and an early Notice of Allowance are earnestly solicited.

Applicants request that the Examiner notify the undersigned attorney when the Examiner takes up this case for further review and examination. Applicants desire to conduct a telephone interview with the Examiner if the Examiner does not find the above remarks persuasive and if the present Amendment does not put the application in condition for allowance. Therefore, if the Examiner intends to issue an Office Action rejecting any of the claims as amended, it is respectfully requested that the Examiner first call the undersigned attorney prior to issuing an Office Action so that a telephone interview can be arranged.

Respectfully submitted,



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